(1) 95-419

Supreme Court, U.S.
FILED
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

EDDIE L. TAYLOR, Petitioner,

v.

THE GOODYEAR TIRE & RUBBER COMPANY,
Respondent

On Petition for a Writ of Certiorari to
the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an action brought pursuant to Section 510 of the Employee's Retirement Income Security Act Hereinafter ERISA), 29 U.S.C. Section 1140, has a statute of limitations for breach of a written agreement, or the statute of limitation based on employment discrimination and/or wrongful termination law.

2. Can the statute of limitation run against an individual who is mentally ill?

3. Does the doctrine of collateral estoppel and res judicata preclude litigating a claim based on ERISA even after arbitration of termination of benefits has occurred resulting in an adverse decision to claimant?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

EDDIE L. TAYLOR, Petitioner,

v.

THE GOODYEAR TIRE & RUBBER COMPANY,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Plaintiff respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix 1-3) and the district court are unreported.

JURISDICTION

The court of appeals entered its judgment in this matter on October 17, 1994, and after timely filing for a Petition for Rehearing, The Court of Appeals for the Sixth Circuit denied the Petition on May 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Section 510 of the Employee's Retirement Income Security Act (ERISA), 29 U.S.C. Section 1140, (Appendix 6) provides, in pertinent part, that it shall be unlawful for any person to discharge, ... a participant or beneficiary for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan ....

The question of what statute of limitation applies to an ERISA claim, or stemming from state law which varies from state to state, and the question of the statute of limitation for an appeal from an arbitration award when the grievant is mentally ill should be clarified by this court.

STATEMENT

Petitioner worked for The Goodyear Tire & Rubber Company and was laid off until January of 1980. While on lay off status, he was incarcerated in the Ohio penal system where he developed and thus began to suffer from a mental illness. While incarcerated and suffering from the mental illness, Respondent The Goodyear Tire & Rubber Company sent Petitioner a recall letter on September 30, 1983 requesting that he return to work.

Petitioner could not respond to the recall letter due to his incarceration, mental illness, and inability to report for work, and hence, his employment status was terminated. When Petitioner was released from prison in 1985, he sought Goodyear to retroactively classify him as on a sick leave of absence due to his mental illness. This endeavor was through grievance and arbitration proceedings.

Acting primarily in a pro se capacity, Petitioner challenged the arbitrators' decision but this was dismissed by the district court on the grounds that Petitioner's complaint was not filed within the three month filing deadline required in the United States Code. This dismissal occurred despite Petitioner's disability of mental illness.

Petitioner further alleged that Goodyear maintained a health insurance and hospitalization plan that would have paid medical expenses arising out of his mental illness, and that Goodyear also maintained a retirement and pension plan in which Petitioner was entitled to participate. Petitioner alleged that when Goodyear discharged him and refused to recall him, Goodyear acted with the intent to interfere with Petitioner's "attainment of benefits under an employee benefit plan and in discrimination of Plaintiff's future participation in the plan because of his mental illness." This was alleged to be a violation of Section 510 under the Employee Retirement Income Security Act, 29 U.S.C. Section 1140. Petitioner also alleged that the actions were in violation and a breach of a collective bargaining

agreement which Goodyear was a party to. Petitioner sought reinstatement and back earnings, as well as compensatory damages.

Respondent The Goodyear Tire & Rubber Company denied that it breached any obligations to Petitioner under ERISA or under any alleged contract. Goodyear also raised the defenses that Petitioner's claims were barred by "the applicable statute of limitations" and that his claims were barred based on "res judicata and collateral estoppel" because Goodyear was previously granted judgment in its favor in a prior Federal lawsuit between the parties arising out of an arbitration between the parties involving the same facts.

Respondent The Goodyear Tire & Rubber Company claims that res judicata must apply because after the recall occurred, and after the time passed, and thereafter

in April of 1985, Petitioner was released from prison, he filed a grievance relating to his termination by the Respondent. Plaintiff pursued his grievance through arbitration and was unsuccessful in being reinstated to his former employment. Plaintiff, however, challenged the arbitration award proceeding in a pro se capacity. This arbitration decision therefore was never reviewed on its merits because the Court found and decided that his challenge was past the limitations period. Subsequently, Plaintiff retained counsel and pursued a motion for relief from judgment pursuant to Federal Rule of Procedure 60(B). This United States District Court for the Northern District of Ohio, Eastern Division, denied this motion and on appeal the Sixth Circuit Court of Appeals affirmed the lower court.

Hence, due to the limited nature of a review of an arbitration decision, Petitioner never asserted any claims under the ERISA act. Therefore, the issue as to whether Petitioner was ever denied benefits, or whether he was inappropriately recalled was never litigated in any proceedings. This is of critical importance because in affirming the lower court's dismissal of Petitioner's ERISA claim, the Court of Appeals reasoned that any ERISA claim is prohibited through the doctrines of res judicata and collateral estoppel as well as finding that the ERISA claim was not filed within the court determined four year statute of limitations.

Petitioner is seeking to have this court once and for all define what statute of limitations applies to an ERISA claim

and to declare that collateral estoppel and res judicata does not apply to a ERISA claim not yet litigated.

A. Employment Retirement Income Security Act

This case involves the construction of how a statute of limitation should be applied and the length of time in regard to a very important statutory provision affecting the lives of workers across America.

Petitioner's claim was originally brought pursuant to 29 U.S.C. Section 1140, which statute does not provide an express statute of limitation. In this instance, Petitioner alleges Respondent The Goodyear Tire & Rubber Company breached various duties to him under a written employee benefit plan and collective bargaining contract. He claims

that they breached the contract by attempting to recall him while he was in a mental illness, that is, disability status, and therefore violated the ERISA statute by discharging him such that he could not participate under the plan.

Contracts in writing typically have a long statute of limitations such as 15 years in the State of Ohio. The employee benefit plan and collective bargaining agreement is a contract and the statute of limitations should be 15 years for breach of such contract and not four years for a wrongful discharge of employment.

This proposition was supported in the Sixth Circuit case of Cowden v. Montgomery County Society for Cancer Control, 591 F. Supp. 740 (S.D. Ohio 1984), where certain claims based on an alleged breach of its pension plan were presented to the Court. The Court commented:

> With respect to those claims ... which appeared to allege that either one or both defendants did not comply with the terms of the pension plan, whose claims sound in contract ... the applicable statute of limitations, then, for such claims is O.R.C. Section 2305.06 which provides that "an action upon ... a contract ... shall be brought within 15 years after the cause thereof accrued. Cowden 591 F. Supp. at 754-755.

The Court in the Southern District of Ohio later held in Dennis v. Sawbrook Steel Castings Co., 792 F. Supp. 552 (S.D. Ohio, 1991) that an action based on a claim alleging violation of a pension plan and collective bargaining agreement has a 15 year statute of limitations. Likewise, in the case at bar, the allegations are of violations of an employee benefit plan and a collective bargaining agreement which are writings, that is "a contract." It is therefore especially appropriate to apply a contract period of limitations to a

breach of a collective bargaining agreement. This Court has spoken to this effect in International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) where the Court held that a union's action for a breach of a collective bargaining agreement is appropriately governed by a state's contract statute of limitations.

Indeed, the neighboring district court in the western district of Pennsylvania has spoken on the subject of statute of limitation period in regard to an ERISA claim. In the case of Delisi v. United Parcel Service, Inc., 580 F. Supp. 1572 (1984), the court followed the proposition that one must look to the most closely analogous state limitations period. The court stated:

> Faced with this question in the past, we have concluded that Pennsylvania's limitations period for contract actions is applicable to ERISA claims.

It is of further public concern that the Federal Circuit Courts that have addressed this issue are in great conflict as to what particular statute of limitations should apply. Some of the Courts have analyzed claims brought under 29 U.S.C. Section 1140 to employment discrimination or wrongful discharge causes of action, such as the lower court in this particular action.

It is thus an important question that this Court should decide as to what number of years the statute of limitations should be on the very important ERISA claims, whether a short term statute of limitations of four years, or a more lengthy statute of limitations such as 15

years. It would seem more appropriate to have a longer statute of limitations so that the integrity of contract can be more likely to be preserved.

It is especially appropriate to apply a state contract period of limitations to a breach of a collective bargaining agreement. In International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) the United States Supreme Court held that a union's action for a breach of a collective bargaining agreement is appropriately governed by a state's contract statute of limitations.

The federal Circuit Courts that have addressed this issue are in conflict. Some courts have analyzed claims brought under 29 U.S.C. Section 1140 to employment discrimination or wrongful discharge causes of action. Felton v. Unisource Corp., 940 F. 2d 503 (9th Cir. 1991);

Gavalik v. Continental Can Co., 812 F. 2d 834 (3d Cir. 1987), cert. denied, 484 U.S. 979 (1987); Clark v. Coats & Clark, Inc., 865 F. 2d 1237 (11th Cir. 1989). This view is far from uniform. In Heideman v. PFL, Inc., 904 F. 2d 1262, 1267 (8th Cir. 1991) the Eighth Circuit rejected the approaches adopted in Felton, Gavalik, and Clark. In Heideman, the Eighth Circuit held that wrongful discharge actions brought under Section 510 of ERISA are properly governed by a state contract statute of limitations. Under Heideman, Petitioner's action would be well within Ohio's statute of limitations for a contract action as Petitioner's claims accrued at the earliest in April, 1985.

What makes the 15 year statute of limitations especially appropriate to Petitioner's claims is that Taylor's complaint involves contractual rights

under Respondent's collective bargaining agreement and employee benefit plans. In Apponi v. Sunshine Biscuits, Inc., 809 F. 2d 1210 (6th Cir. 1987) the Sixth Circuit Court of Appeals held that either under the six year statute of limitations (O.R.C. Section 2305.07) or 15 year statute of limitations (O.R.C. Section 2305.06) would apply to a claim for recovery of early retirement benefits. Application of the 15 year statue of limitations is especially appropriate to Petitioner's claims since his action involves the breach of written employee benefit plans and a collective bargaining agreement.

The Eighth Circuit has analyzed ERISA relative to the conceptual framework of contract principles in Conley v. Pitney Bowes, 34 F. 3d 714 (8th Cir. 1994). That court discussed how employee benefit plans

which constitute bilateral contracts, or agreements where promises of future performance are exchanged, are subject to the common law of contracts.

Clearly, a claim based on ERISA is one of the spirit of contract and not of tortious wrongful discharge.

B. Proceedings Below Further Discussed

At the time of the recall of the Petitioner from lay off status, he was in the Ohio Penitentiary System and was unable to report to work as requested. After his release in April of 1985, he filed a grievance protesting his discharge. The grievance was submitted to arbitration on February 5, 1986 and the arbitrator denied the grievance and upheld the discharge.

Thereafter, the union filed a second grievance on Petitioner's behalf challenging the validity of the first arbitrators' award on the grounds that the award was not issued in a timely manner as called for by the collective bargaining agreement. A second arbitration was held on November 13, 1986 and again the Plaintiff's discharge was upheld. On September 3, 1986 the Plaintiff filed his complaint in the United States District Court for the Northern District of Ohio Eastern Division seeking to vacate the first arbitrators' award that upheld the discharge and denied Petitioner's request for reinstatement. The Respondent filed a motion to dismiss on procedural grounds and on December 24, 1986 the Court granted the Defendant's motion to dismiss pursuant to 9 U.S.C. Section 12 on the grounds that the Petitioner's complaint did not comply

with the three month filing deadline set forth in the United States Code, which section requires that:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

In its judgment entry of December 24, 1986, the Court cited the fact that the adverse arbitration award was issued on April 14, 1986 while Plaintiff did not file his complaint in the Court until September 3, 1986, some 45 days beyond the filing deadline as required by 9 U.S.C. Section 12.

The Court failed to acknowledge that Petitioner was under a mental ill status and that therefore the statute of limitations cannot run against such an individual.

It is important to further acknowledge that at no time was the arbitration matter heard on the merits by the Court.

Thereafter, Petitioner filed another complaint against Respondent on September 4, 1992 alleging a violation of ERISA Section 510, 29 U.S.C. Section 1140, asserting the aforesaid claims. On May 5, 1993, the District Court granted Respondent's motion for judgment on the pleadings as to Petitioner's ERISA Section 510 claim, deferring judgment on Petitioner's contract claims, and notifying the parties of the conversion of Respondent's motion for judgment on the pleadings to one for summary judgment as to Petitioner's contract claim. The Court granted summary judgment to Respondent as to Petitioner's contract claims under the doctrines of collateral estoppel and res

judicata. Petitioner then filed a notice of appeal to the Sixth Circuit Court of Appeals which court affirmed the district court's decision.

It is important for this Court to review the issue of collateral estoppel and res judicata as applies to the filing of an ERISA claim even when not filed before a labor arbitration proceeding. Respondent's argument that the doctrines of res judicata and collateral estoppel must preclude petitioner's claim is erroneous. Indeed, this issue was studied in the case of Manser v. Missouri Farmers Association, 652 F. Supp. 267 (W.D. MO 1986). Hence, the litigation of an ERISA claim cannot be dismissed summarily without hearing on the merits just because the matter in some form was ruled upon by an arbitrator. The lower court's

affirmance of the trial court's dismissal of petitioner's claim on these two doctrines is clearly erroneous.

REASONS FOR GRANTING THIS PETITION

It is clear that at the district court level conflicting decisions are proliferating rapidly in nearly all circuits and the need for guidance from this Court in regard to this very important federal statute is acute. This case is thus submitted on a timely and opportune basis so the court can provide guidance since there are clear reasons why few of the district court decisions receive appellate review. Furthermore, the decision below is erroneous and the issue addressed is very important.

One of the most critical components of any action is the time frame in which it can be brought before it is out of

time. Certainly, this court should restate clearly that an individual who is mentally ill tolls any statute of limitation, but more significantly, a litigant should be able to rely on a time certain and not have to reflect on appellate hindsight what the statute of limitation for filing should have been.

The only way for ERISA to have a defined limitation period would be for this court to guide whether an action through ERISA sounds in contract or wrongful termination. To simply say that the limitation should be governed by that of the state limitation period cannot suffice because this proposition requires an interpretation and value judgment which could alter the statute from four years to six year to 15 years. The lower court in finding that the statute was akin to a wrongful discharge statute of limitation

is simply erroneous because an interference with a contract benefit is a breach of a writing.

Regardless of the length of a statute of limitation, a mentally ill laborer should not be denied the tolling of a statute or a time period where the law clearly tolls the statute for such a disabled individual. The decision of the court below contrary to this finding is simply erroneous but more importantly, unjust.

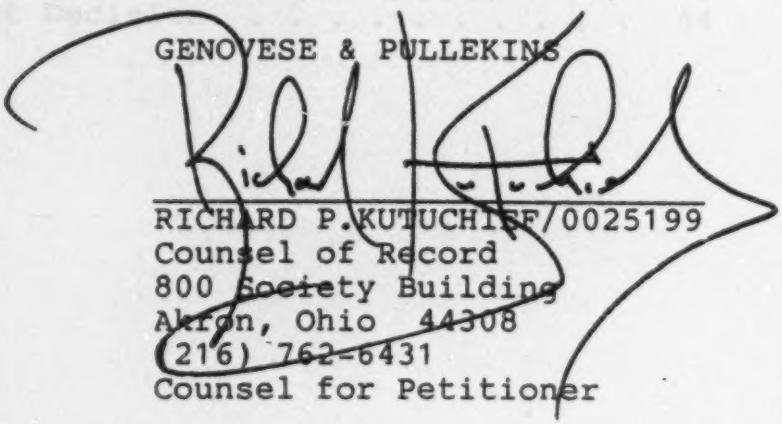
Finally, review of the decision below is important because of the cloud it places over the statute of limitations applicable to other labor provisions in the United States Code. This court should resolve the uncertainty and remove this cloud.

CONCLUSION

This petition for a writ of certiorari should be granted and the issue of the statute of limitations and proceedings in regard to ERISA relevant to grievances and arbitration awards should be defined and clarified.

Respectfully submitted,

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APPENDIX

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Appendix A

Filed
October 17, 1994

No. 93-4059

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE TAYLOR,)
)
Plaintiff-Appellant,)
)
v.) O R D E R
)
THE GOODYEAR TIRE &)
RUBBER COMPANY,)
)
Defendant-Appellee,)

BEFORE: MARTIN, NELSON and NORRIS,
Circuit Judges

Eddie Taylor, a pro se Ohio resident, appeals a district court judgment which construed Taylor's complaint as having been brought under Section 510 of the Employment Retirement Income Security Act (ERISA), 20 U.S.C. Section 1140, and under Section 301 the Labor Management Relations Act (LMRA), 29 U.S.C. Section 185. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this

panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Taylor was employed by Goodyear from June 27, 1968, until January 23, 1980. Taylor alleged that while he was on layoff status at Goodyear, he was incarcerated in an Ohio prison and was mentally ill. During his incarceration, Goodyear sent Taylor a recall letter on September 30, 1983, despite the fact that Taylor had informed Goodyear that he was incarcerated and being treated for mental illness. After Taylor was released from prison, Taylor requested that Goodyear recall him and retroactively classify him as on sick leave during his period of incarceration, and Goodyear refused to comply. Taylor alleged that it was Goodyear's intent to interfere with Taylor's attainment of benefits in the employee benefit plan and

in his future participation in this plan in violation of ERISA, 29 U.S.C. Section 1140, and in violation of "a collective bargaining agreement."

On May 5, 1993, the district court granted Goodyear's motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) as to Taylor's claim under Section 510 of ERISA. The district court treated Goodyear's motion for judgment on the pleadings as one for summary judgment with regard to Taylor's breach of a collective bargaining agreement claim and found in favor of Goodyear on this claim. On appeal, Taylor's brief is construed as arguing those claims which he raised in the district court.

Upon de novo review, we conclude that the district court properly dismissed Taylor's claim under Section 510 of ERISA pursuant to Fed. R. Civ. P. 12(c), because

after accepting all the factual allegations of the complaint as true, there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law. See Paskvan v. City of Cleveland Civil Serv. Comm'n, 946 F.2d 1233, 1235 (6th Cir. 1991). Because 29 U.S.C. Section 1140 does not provide a statute of limitations for claims brought under Section 510 of ERISA, we adopt the most analogous state statute of limitations. Tolle v. Carroll Touch, Inc., 977 F2d 1129, 1137 (7th Cir. 1992); McClure v. Zoecon, Inc., 936 F2d 777, 778 (5th Cir. 1991). The most analogous state statute of limitations for Section 510 ERISA claims is based on employment discrimination and/or wrongful termination law. See Tolle, 977 F.2d at 1137-38 (Illinois five-year statute of limitations applicable to claims for retaliatory

discharge was applied to Section 510 ERISA claim); Felton v. Unisource Corp., 94 F.2d 503, 512 (9th Cir. 1991)(most analogous state statute of limitations for Section 510 ERISA claim is wrongful termination against public policy or retaliatory discharge); McClure, 936 F.2d at 778 (proper characterization of Section 510 ERISA action for limitations purposes is as wrongful discharge or employment discrimination claim); Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1205 (10th Cir. 1990)(most analogous state statute of limitations regarding Section 510 ERISA claim is one for employment discrimination); Gavalik v. Continental Can Co., 812 F.2d 834, 843-46 (ed Cir.), cert. denied, 484 U.S. 979 (1987) (relied on state statute of limitations applicable to employment discrimination in Section 510 ERISA case).

Taylor's Section 510 ERISA claim is barred by the applicable Ohio statute of limitations as set forth in Ohio Rev. Code Section 2305.09(D) because his complaint was filed more than four years after his cause of action accrued.

With regard to Taylor's claim that Goodyear breached the collective bargaining agreement, we conclude that summary judgment was properly entered in favor of Goodyear because there is no genuine issue of material fact and Goodyear is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Taylor's claim is barred by the doctrines of res judicata, Kremer v. Chemical Constr. Corp., 456 U.S. 461, 467 n.6(1982); White v. Colgan Elec. Co., 781 F.2d 1214, 1216 (6th Cir. 1986); Anchor Motor Freight v. International Bhd. of Teamsters, 700 F.2d

1067, 1070 (6th Cir.), cert. denied, 464 U.S. 819 (1983); Nathan v. Rowan, 651 F.2d 1223, 1226 (6th Cir. 1981), and collateral estoppel. Montana v. United States, 440 U.S. 147, 153-54 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979); United States v. Three Tracts of Property, 994 F.2d 287, 290 (6th Cir. 1993). Taylor has already unsuccessfully litigated the issue of whether Goodyear breached the collective bargaining agreement in terminating Taylor's employment with Goodyear, see Taylor v. Goodyear Tire & Rubber Co., No. C86-3869(A) (N.D.Ohio July 30, 1991), and this court affirmed the district court's judgment on appeal. See Taylor v. Goodyear Tire & Rubber Co., No. 91-3812, 1992 WL 56750 (6th Cir. Mar. 23, 1992)

(per curiam). Therefore, Taylor's LRMA claim is barred by the doctrines of res judicata and collateral estoppel.

Accordingly, we affirm the district court's judgment. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

"s/Leonard Green"

Clerk

Appendix B

Filed May 5, 1995

Case No: 93-4059

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

EDDIE TAYLOR

Plaintiff-Appellant

v.

THE GOODYEAR TIRE & RUBBER COMPANY

Defendant-Appellee

Upon consideration of the petition for rehearing filed by the plaintiff,

It is ORDERED that the petition for hearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

"s/Leonard Green"

Leonard Green, Clerk

Section 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USCS Section 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USCS Section 1132] shall be applicable in the enforcement of this section.
(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 5, Section 510, 88 Stat. 895.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

References in test:
"This title", referred to in this section, is Title I of Act Sept. 2, 1974, P. L. 93-406, 88 Stat. 832, popularly known as the Employee Retirement Income Security Act.

Filed August 19, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDDIE TAYLOR, CASE NO. 5:92 CV 1826

Plaintiff

JUDGE SAM H. BELL

vs.

THE GOODYEAR TIRE &
RUBBER COMPANY,

O R D E R

Defendant

On May 5, 1993, this court entered an order which concluded with the following paragraph:

> In accordance with the foregoing reasoning, the defendant's motion for judgment on the pleadings, Docket #26, is GRANTED IN PART and DENIED IN PART. Judgment on plaintiff's ERISA claim is GRANTED in favor of the defendant. Judgment on plaintiff's contract claim and its preclusion by the doctrine of res judicata is DEFERRED. Plaintiff is hereby NOTIFIED of the conversion of the remaining [portion of] defendant's motion to one for summary judgment. Both plaintiff and defendant are hereby GRANTED, if desired, ten (10) days leave to supplement their submissions on this issue.

Taylor v. Goodyear Tire & Rubber Co., No. 5:92 CV 1826, slip op. at 9-10 (N.D. Ohio May 5, 1992)(Order Granting Partial Judgment on the Pleadings). To date, neither plaintiff's nor defendant's counsel have made additional submissions on the propriety of summary judgment. As such, the court shall now fashion its own opinion on the basis of their earlier filed papers.

In his complaint, plaintiff avers that:

> [t]he action of Defendant in discharging Plaintiff, refusing to recall and/or placing Plaintiff on its recall list after completing his incarceration ... are also in violation and a breach of a collective bargaining agreement Defendant is a party to.

(Complaint at paragraphs 16-17). As the court noted in its prior order, this comprises plaintiff's extant claim and the one currently under attack:

> [i]t seems clear that plaintiff now intends to pursue a claim under Section 301 of the LMRA. While the court is inclined to believe that such a claim does not apparently lie on the face of the complaint, the defendant has not addressed any pleading deficiencies. ... Thus, we must address the grounds for judgment urged by the defendant, res judicata.

Taylor v. Goodyear Tire & Rubber Co., No. 5:92 CV 1826, slip op. at 7-8 (N.D. Ohio May 5, 1993). On the basis of the parties' briefs and evidence, reasonable minds could only conclude that the plaintiff's claims are barred by the doctrine of res judicata.

As noted by our Circuit court, "[a] final judgment on the merits in an action precludes a party from bringing a subsequent lawsuit on the same claim or cause of action or raising a new defense to defeat a prior judgment." Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, 918

F.2d 658, 660 (6th Cir. 1990). Under this doctrine, the prior parties or their privies may not relitigate issues that were or could have been raised in that action. Kremer v. Chemical Construction Corp., 456 U.S. 461, 467 at note 6 (1981). This case surely presents such a circumstance.

As our Circuit Court has already noted:

> When he was released from prison in 1985, Mr. Taylor invoked the grievance procedure of the governing collective bargaining agreement to protest his termination. He argued that Goodyear should have considered him to be on leave of absence for illness, since he was being treated for mental illness while incarcerated. ... The grievance went to arbitration, and an award in favor of the defendants was delivered on April 14, 1986.

Taylor v. Goodyear Tire & Rubber Co., No. 91-3812, slip op. at 2 (6th Cir. March 23, 1992)(per curiam). In September 1986,

plaintiff brought suit in the Northern District of Ohio to challenge the arbitration award. His complaint challenged the arbitrator's award, his termination under the terms of the contract and the service credit given him by Goodyear. (See Defendant's Motion, Docket #26, Exhibit C) Judge Dowd dismissed plaintiff's challenge as untimely and concluded in his final order:

> [i]n summary, Mr. Taylor has been afforded a full and fair opportunity for review of his claims at arbitration and in this Court. ... While the Court is sympathetic to Mr. Taylor's situation and to his sincere belief that he was unjustly discharged, for the reasons previously stated, the Court is unable to grant the plaintiff's requested relief.

Taylor v. Goodyear Tire & Rubber Co., No. C86-3869A, slip op. at 6-7 (N.D. Ohio July 30, 1991). On March 23, 1992, the Sixth Circuit affirmed Judge Dowd's actions.

Taylor v. Goodyear Tire & Rubber Co., No. 91-3812, slip op. (6th Cir. March 23, 1992)(per curiam).

On the basis of plaintiff's prior litigation, the court must conclude that the defendant's violation of the collective bargaining agreement has already been litigated -- leading, no doubt, to collateral estoppel on that point. Regardless of this conclusion, however, it is clear that plaintiff's prior arbitration and appeal addressed the very claims made here, barring this suit under the doctrine of res judicata. See, e.g., Fisher v. Martin Marietta Energy Systems, Inc., 815 F.2d 703 (6th Cir. 1987)(table opinion - text in Westlaw) The Court, on its own initiative, further notes that any contract claim is clearly barred by the statute of limitations.

Accordingly, the court simply has no choice other than that urged by the defendant -- judgment in favor of Goodyear. There is no genuine issue that plaintiff's claims could have been and were raised in prior litigation, and are barred for that reason and for their untimeliness. Accordingly, the remaining portion of the defendant's motion for judgment on the pleadings (Docket #26), which has been converted to one for summary judgment, is GRANTED IN ITS ENTIRETY.

IT IS SO ORDERED.

"s/Sam H. Bell"

SAM H. BELL
United States District
Judge

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[1] The court sees no merit in a contention the plaintiff's ERISA claim could not have been joined with those in his previous complaint before Judge Dowd. See Fed.R.Civ.P. 18.

Appendix E

Filed May 5, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDDIE TAYLOR — CASE NO. 5:92 CV 1826

Plaintiff

JUDGE SAM H. BELL

vs.

THE GOODYEAR TIRE & RUBBER COMPANY

Defendant

O R D E R

Currently before the court is defendant's motion for judgment on the pleadings. (Docket #26) The parties have fully briefed this matter, rendering the instant motion ripe for adjudication.

Standard of Review

When considering a Rule 12(c) motion, the court must accept all factual allegations of the complaint as true. Beal v. Missouri Pac. R.R., 312 U.S. 45, 51, 61 S.Ct. 418, 85 L.Ed.2d 577 (1941); Paskvan v. City of Cleveland Civil Service

Commission, 946 F2d 1233, 1235 (6th Cir. 1991). The motion may be granted when the movant is entitled to judgment as a matter of law. Paskvan, 946 F2d at 1235. Thus, the analytical framework for motions requesting judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) mirrors that utilized under Rule 12(b)(6); Drouillard v. Roche Biomedical Laboratories, Inc., 861 F2d 720, 1988 U.S.App.LEXIS 14616 (6th Cir. 1988); Adkins v. Westinghouse Materials Co., 779 F.Supp. 922 (S.D.Ohio 1991), aff'd without opinion, 983 F2d 1065 (6th Cir. 1993); Vermett v. Hough, 606 F.Supp. 932 (W.D.Mich. 1984). Both Rules 12(b)(6) and 12(c) provide appropriate methods for raising a statute of limitations defense. Rauch v. Day & Night Mfg. Corp., 576 F2d 697, 702 (6th Cir. 1978); Craig v. Western & Southern Indemnity Co., 119 F.2d 591

(6th Cir. 1941); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure Section 1368 (1990). With These standards in mind, the court shall review the defendant's motion.

Law and Analysis

In his complaint, plaintiff alleges that he was formerly an employee of the defendant, and eventually suffered mental illness and was incarcerated. During his imprisonment, plaintiff received a recall letter to which he could not respond due to his confinement. As a result, he was terminated. Plaintiff alleges that he "was released from prison in April, 1985 and requested that defendant retroactively classify him as on a sick leave of absence during his incarceration. Defendant refused to comply with that request."

(Complaint at paragraph 10) On the basis of these and other extraneous alleged facts, plaintiff avers that:

> [t]he action of Defendant in discharging Plaintiff, refusing to recall and/or placing Plaintiff of its recall list after completing his incarceration was for the purpose of interfering with Plaintiff's attainment of benefits under an employee benefit plan and in discrimination of Plaintiff's future participation in the plan because of his mental illness. Said actions are also in violation and a breach of a collective bargaining agreement Defendant is a part to.

Defendant's action are in violation of 29 U.S.C. Section 1140. (Complaint at paragraphs 16-17) In its motion, the defendant contends that plaintiff's ERISA claim is barred by the statute of limitations. This court agrees.

As noted above, plaintiff claims a violation of Section 510 of ERISA, 29 U.S.C. Section 1140. That section provides, in pertinent part, the following:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan ....

29 U.S.C. Section 1140. ERISA does not provide a statute of limitations for claims brought under Section 510. See, e.g., Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1137 (7th Cir. 1992); Felton v. Unisource Corp., 940 F.2d 503, 510 N.10 (9th Cir. 1991); McClure v. Zoecon, Inc., 936 F.2d 777, 778 (5th Cir. 1991). In such a situation, where "there is no

federal statute of limitations ... Congress intended that the courts apply the most closely analogous statute of limitations under state law." DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 158 (1983). See also, Wilson v. Garcia, 471 U.S. 261, 266 (1985) ("the settled practice [is] to adopt a local time limitation as federal law.")

The United States Court of Appeals for the Sixth Circuit has not addressed the limitations period applicable to actions brought under Section 510 of ERISA.[1] That issue has, however, been the subject of decision by one Ohio district court. In Cowden v. Montgomery County Society for Cancer Control, 591 F.Supp. 740 (S.D.Ohio 1984). In Cowden, Judge Rice stated:

> Plaintiff is alleging that both Defendants have discriminated against him in violation of 29 U.S.C. Section 1140. To the

> extent Plaintiff is alleging violations of ERISA statutory provisions, the Court finds ORC Section 1305.07 to be the controlling statute of limitations. This section provides, "an actions ... upon a liability created by statute ... shall be brought within six years after the cause thereof accrued."

Cowden, 591 F.Supp. at 755. Judge Rice's reasoning, while persuasive, is not binding upon this court and is not shared by all courts which have studied this issue.

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[1] Plaintiff's citations to Apponi v. Sunshine Biscuits, Inc., 809 F2d 1210 (6th Cir. 1987), cert. denied, 484 U.S. 820 (1987) and Dennis v. Sawbrook Steel Castings Co., 792 F.Supp. 552 (S.D.Ohio 1991) are inapposite.

Federal courts analyzing Section 510 have analogized it to actions upon contracts, wrongful discharge and, as did Judge Rice, to a statutory action with no analogous state law claim. See, e.g., Heideman v. PFL, Inc., 904 F2d 1262, 1267 (8th Cir. 1990) (following contact limitations without analysis); Gavalik v. Continental Can Co., 812 F.2d 834, 843 (3rd Cir.), cert. denied, 484 U.S. 979 (1987) (analogous to employment discrimination claim because Section 510 claim is essentially claim of discrimination upon the basis of benefit application or eligibility). This court believes the latter view is most well reasoned and must note that "the

majority of courts of appeals that have addressed this issue have concluded that ... the most analogous statute of limitations for Section 510 claims are based on employment discrimination and/or wrongful termination law." Tolle v. Carroll Touch, Inc., 977 F2d 1129, 1137-38 (7th Cir. 1992) (citing Felton v. Unisource Corp., 940 F2d 503 (9th Cir. 1991); McClure v. Zoecon, Inc., 936 F.2d 777, 778-79 (5th Cir. 1991); Held v. Manufacturers Hanover Leading Corp., 912 F2d 1197, 1205 (10th Cir. 1990); Gavalik, supra).

Under this paradigm, plaintiff's cause of action should be compared to wrongful discharge in violation of public policy. See, e.g., Felton, 940 F.2d at 512. The statute of limitations governing such claims is Ohio Revised Code Section 2305.09(D) -- four years. Painter v.

Graley, No. 61148, slip op., 1992 Ohio App.LEXIS 6287, 1992 WL 369287 (Ohio App. 8th Dist. Dec. 10, 1992); see also Bojac Corp. v. Kutevac, 64 Ohio App.3d 368 (1990). Although this court believes, like Judge Ferguson in the Felton decision, that "state civil rights statutes ... may not be sufficiently analogous to Section 510 to fulfill the congressional purposes embodied in ERISA", an application of the limitations period applicable to such claims would produce an identical effect in the case at bar. Felton, 940 F.2d at 512. See, e.g., Gavalik, 812 F.2d at 843 (Section 510 analogous to employment discrimination claim). The difficulty with the analogy, as noted by the Felton Court, is the variable limitations periods applicable to such claims under state law. Felton, 940 F2d at 512. In Ohio, for instance, an

employment discrimination claim can be subject to limitations periods ranging from one hundred eighty days to six years. See, e.g., Duvall v. Titan Equipment Corp., No. 62809, slip op. 1992 Ohio App. LEXIS 3310, *4 (Ohio App. 8th Dist. June 25, 1992), motion overruled, 65 Ohio St.3d 1454 (1992). for these reasons, this court finds persuasive the opinions of the Felton and Cowden courts. Nevertheless, all the approaches recommended by the various majority courts of appeals and Judge Rice would render plaintiff's Section 510 claim untimely. Both plaintiff and defendant agree that plaintiff's cause of action accrued in April 1985. (Defendant's Motion, Docket #26 at 9-10; Plaintiff's Memorandum in Opposition, Docket #29 at 5) At most, analogous Ohio law would grant plaintiff six years to file his complaint. As such,

plaintiff was required to bring his charge by April of 1991. Consequently, plaintiff's complaint which brings his Section 510 claim, filed on September 4, 1992 shows an insuperable bar to relief, mandating judgment on the pleadings. This conclusion, however, does not end our inquiry.

Defendant's motion is grounded on two alternative positions. First, that the plaintiff has brought only one claim, pursuant to ERISA Section 510, and that this claim is untimely. Second, defendant contends that plaintiff's case is barred by the doctrine of res judicata. In attempting to avoid the limitations conclusion reached above, plaintiff's counsel has argued that "Taylor's complaint involves contractual rights under Defendant's collective bargaining agreement...." (Plaintiff's Memorandum at

5). As defendant has also noted, plaintiff's complaint is brought specifically pursuant to Section 510 of ERISA and its sole reference to contract rights is that "said actions are also in violation and a breach of a collective bargaining agreement defendant is a party to." (Complaint at paragraph 16) Nevertheless, it appears that plaintiff is intending to pursue a breach of contract claim. If so, defendant urges this court to preclude relitigation of such a claim under the doctrines of res judicata and collateral estoppel. (See Defendant's Reply Brief, Docket #30 at 6)(Plaintiff's assertion ... that his claim is not really an action ... under ERISA Section 510 ... and instead is really an action for breach of the collective bargaining agreement conflicts with his argument that the

claims should not be barred based on res judicata and collateral estoppel.) This situation presents some difficulty.

It seems clear that plaintiff now intends to pursue a claim under Section 301 of the LMRA. While the court is inclined to believe that such a claim does not apparently lie on the face of the complaint, the defendant has not addressed any pleading deficiencies. Thus, the adequacy of plaintiff's allegations are moot at this juncture. See, e.g., Tingler v. Marshall, 716 F.2d 1109 (6th Cir. 1983), Local 627 v. Ohio Carpenters Health and Welfare Fund, 926 F.2d 550 (6th Cir. 1991)(no sua sponte 12(b)(6) dismissals). Thus, we must address the grounds for judgment urged by the defendant, res judicata. In so doing, this court is, of course, constrained by the Federal Rules of Civil Procedure.

Regardless of the apparent merits of defendant's arguments, judgment at this juncture and on the vehicle chosen by defendant is simply inappropriate. The defendant has moved for judgment on the pleadings, a procedural device mirroring that provided for in Rule 12(b)(6). Drouillard, 861 F.2d 720, 1988 U.S.App.LEXIS 14616 (6th Cir. 1988); Adkins v. Westinghouse Materials Co., 779 F.Supp. 922 (S.D.Ohio 1991). For a complaint to be dismissed because the allegations give rise to an affirmative defense, "the defense clearly must appear on the fact of the pleading." 5A C. Wright & A. Miller, Federal Practice and Procedure Section 1357 at 348-49 (2d ed. 1990)(citing McNally v. American States Ins. Co., 382 F.2d 748, 752 (6th Cir. 1967)("the complaint should not have been dismissed ... res judicata [is not] made

out with the clarity required for summary sustaining of such proffered defense.") In the case at bar, the complaint does not mention even by inference the prior litigation of the plaintiff -- although the court acknowledges that it is extensive. Indeed, the defendant has found it necessary to proffer court documents to establish the fact of prior litigation. Clearly, plaintiff's complaint does not on its face establish the propriety of judgment on the basis of res judicata. As such, judgment on the pleadings is inappropriate. This court may, of course, convert defendant's motion to one for summary judgment. As noted in Rule 12, "[i]f a motion for judgment on the pleadings , matters outside the pleadings are presented to ... the court, the motion shall be treated as one for summary judgment." Fed.R.Civ.P. 12(c).

Defendant's motion and proffered material are thus, in effect, a motion for summary judgment. The court is, nevertheless, precluded from granting judgment at this time. The Sixth Circuit has repeatedly stated that:

> Federal Rule of Civil Procedure 56(c) requires that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." ... Where a Rule 12(b)(6) motion to dismiss is converted into a summary judgment motion by acceptance of outside evidence, care must be taken to assure that the nonmoving party is afforded advance notice as required by Rule 56 and an adequate opportunity to show why summary judgment should not be granted.

McDonald v. Seabold, 780 F.2d 1022 (6th Cir. 1985)(table opinion). While the non-movant should be given such notice, "conversion to summary judgment without usual notice ... is grounds for reversal only when the conversion results in

prejudice." Nuclear Transport & Storage, Inc. v. United States, *90 F.2d 1348, 1351 (6th Cir. 1989), cert. denied, 494 U.S. 1079 (1990). Such prejudice rarely results "if only a substantive law question is involved." Id. While this circumstance may very well be presented by the instant motion, this court believes it would be inequitable and certainly imprudent to now hold that defendant is entitled to judgment as a matter of law. Judgment on the basis of res judicata may not be had at this time.

Conclusion

In accordance with the foregoing reasoning, the defendant's motion for judgment on the pleadings, Docket #26, is GRANTED IN PART and DENIED IN PART. Judgment on plaintiff's ERISA claim is GRANTED in favor of the defendant. Judgment on Plaintiff's contract claim and

its preclusion by the doctrine of res judicata is DEFERRED. Plaintiff is hereby NOTIFIED of the conversion of the remaining defendant's motion to one for summary judgment. Both plaintiff and defendant are hereby GRANTED, if desired, ten (10) days leave to supplement their submissions of this issue.

IT IS SO ORDERED.

"s/Sam H. Bell"

SAM H. BELL
United States District
Judge

Supreme Court, U.S.
FILED
OCT 10 1995
CLERK

No. 95-419

In The

Supreme Court of the United States

October Term, 1995

EDDIE L. TAYLOR,

Petitioner,

vs.

THE GOODYEAR TIRE & RUBBER COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES

The parties before the Sixth Circuit Court of Appeals and this Court are Petitioner, Eddie L. Taylor, and Respondent, The Goodyear Tire & Rubber Company.

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Respondent respectfully requests this Court to deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported. The opinion of the United States District Court for the Northern District of Ohio is also unreported. Both are included in the Appendix to the Petition for a Writ of Certiorari filed by the Petitioner.

STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C. § 1140.

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

Ohio Revised Code § 2305.09 Four years; certain torts.

> An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, 2305.14 and 1304.35 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

STATEMENT OF THE CASE

Petitioner filed a Complaint against Respondent, The Goodyear Tire & Rubber Company ("Goodyear"), on September 4, 1992, (Respondent's Appendix A) alleging a violation of § 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1140. (Appendix A, ¶¶1, 17) Petitioner alleged that he was employed by Respondent Goodyear in various capacities, including as a tire builder, from June 27, 1968 until January 23, 1980. (Appendix A, ¶4) Petitioner alleged that, during some unspecified period of time, he was on layoff status, was incarcerated in the Ohio penal system, and contracted a mental illness. (Appendix A, ¶5) Petitioner alleged that despite giving notice to a member of Goodyear's management that he was incarcerated and was suffering from a mental illness, Goodyear sent Petitioner a recall letter on

September 30, 1983 requesting that he return to work. (Appendix A, ¶¶6, 7 and 8)

Petitioner alleged that he could not respond to Goodyear's recall letter because he was incarcerated and, due to his inability to report for work, his employment status was terminated. (Appendix A, ¶9) According to Petitioner's Complaint, he was released from prison in April, 1985, at which time he requested that "Goodyear retroactively classify him as on a sick leave of absence during his incarceration period." (Appendix A, ¶10) Petitioner alleged that Goodyear refused to comply with his request to be classified on sick leave while in prison. (*Id.*)

Petitioner further alleged in his Complaint that Goodyear maintained a health insurance and hospitalization plan that would have paid medical expenses arising out of his mental illness, and that Goodyear also maintained a retirement and pension plan in which Petitioner was entitled to participate. (Appendix A, ¶¶11 and 12) Petitioner alleged that when Goodyear discharged him, refused to recall him, and/or placed him on a recall list after he completed his incarceration, Goodyear allegedly acted with the intent to interfere with Petitioner's "attainment of benefits under an employee benefit plan and in discrimination of Plaintiff's future participation in the plan because of his mental illness." (Appendix A, ¶16) Petitioner also alleges that these actions were "in violation and a breach of a collective bargaining agreement Goodyear is a party to." (*Id.*) In his prayer for relief, Petitioner sought compensatory damages for lost earnings and benefits from April, 1985 to the present, along with reinstatement to his former position, costs, and attorneys' fees.

In its Answer, Goodyear denied that it breached any obligations to Petitioner under ERISA or under any alleged contract. Goodyear also raised the affirmative defenses that Petitioner's claims are barred by the applicable statute of limitations and that his claims are barred based on *res judicata* and collateral estoppel. Respondent Goodyear was previously granted judgment in its favor in a prior federal lawsuit between the parties arising out of an arbitration involving the same facts, which was eventually resolved on appeal to the Sixth Circuit Court of Appeals. (*See*, Appendix B)

On May 5, 1993, the District Court granted Goodyear's Motion for Judgment on the Pleadings as to Petitioner's ERISA § 510 claim. (Petitioner's Appendix E) The District Court deferred judgment on Petitioner's contract claims, and notified the parties of the conversion of Goodyear's motion for judgment on the pleadings to one for summary judgment as to Petitioner's contract claim. (*Id.*) The District Court granted both parties ten days leave to supplement their submissions on the issue of the preclusion of Petitioner's contract claims by the doctrines of *res judicata* and collateral estoppel. (*Id.*)

Having received no additional submissions from the parties, on August 19, 1993, the District Court granted summary judgment to Goodyear as to Petitioner's contract claims under the doctrines of collateral estoppel and *res judicata*. (Petitioner's Appendix D) On September 20, 1993, Petitioner filed a Notice of Appeal to the Sixth Circuit Court of Appeals. On October 17, 1994, the Sixth Circuit affirmed the decision of the District Court, finding that Petitioner's claim was barred by not only the statute

of limitations, but also by the doctrines of *res judicata* and collateral estoppel. (Petitioner's Appendix A)

SUMMARY OF ARGUMENT

None of the grounds asserted by Petitioner present any substantial issue for review by this Court. The Court of Appeals for the Sixth Circuit properly affirmed the decision of the District Court for the Northern District of Ohio granting Respondent judgment on the pleadings as to Petitioner's claims under ERISA § 510, and the District Court's grant of summary judgment to Respondent as to Petitioner's breach of contract claims. Due to the fact that ERISA § 510 does not provide a statute of limitations for claims brought thereunder, the Sixth Circuit properly applied the four-year statute of limitations for wrongful discharge claims under Ohio law for violation of public policy. The Sixth Circuit's application of the statute of limitations for claims based on wrongful employment termination is consistent with the majority of the United States Circuit Courts which have addressed this issue.

The Sixth Circuit also properly affirmed the summary judgment for Respondent on Petitioner's breach of contract claim due to the fact that this claim was barred based on the doctrine of *res judicata* and collateral estoppel. The issue of whether or not Petitioner was properly discharged from his employment with Respondent was already arbitrated and litigated between the parties in prior proceedings.

REASONS FOR DENYING THE PETITION

I. THE SIXTH CIRCUIT PROPERLY APPLIED THE FOUR-YEAR STATUTE OF LIMITATIONS FOR WRONGFUL DISCHARGE CLAIMS UNDER OHIO LAW TO PETITIONER'S CLAIM UNDER ERISA § 510.

The Court should deny Petitioner's Writ of Certiorari because the Sixth Circuit properly upheld judgment for Respondent on Petitioner's ERISA § 510 claim because it was barred by the applicable Ohio statute of limitations. Section 510 does not provide a statute of limitations for claims brought under it. *See, e.g., Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1137 (7th Cir. 1992); *Felton v. Unisource Corp.*, 940 F.2d 503, 510 n.10 (9th Cir. 1991); *McClure v. Zoecon, Inc.*, 936 F.2d 777, 778 (5th Cir. 1991); and *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241 (11th Cir. 1989). Therefore, where a federal statute provides no statute of limitations, this Court has held that "the courts must apply the most closely analogous statute of limitations under state law." *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983); *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). *See, also, Gavalik v. Continental Can Co.*, 812 F.2d 834, 843 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987).

In its decision, the District Court canvassed the Circuit courts and found that " 'The majority of Courts of Appeals that have addressed this issue have concluded that . . . the most analogous statute of limitations for § 510 claims are based on employment discrimination and/or wrongful termination law.' " Order of May 5, 1993, (Petitioner's Appendix E, pp. 51-52) quoting *Tolle, supra*, 977 F.2d at 1137-38; *citing, Felton, supra*, 940 F.2d at 510 n.10;

and *McClure, supra,* 936 F.2d at 778-79. *See, also, Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197, 1205 (10th Cir. 1990); *Gavalik, supra,* 812 F.2d at 843; *Hinton v. Pacific Enterprises,* 5 F.3d 391, 394 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 1833 (1994); *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 160 (11th Cir. 1992); and *Teumer v. General Motors Corporation,* 840 F. Supp. 538, 543 (N.D. Ill. 1993).

Following the analysis of the majority of the Circuit Courts, the District Court decided that Petitioner's claim under § 510 should be compared to a wrongful discharge action in violation of Ohio public policy. Therefore, the District Court applied the four-year statute of limitations applicable to such claims set forth in Ohio Revised Code § 2305.09(D). *See, e.g., Painter v. Graley,* 84 Ohio App. 3d 65 (1992), *aff'd,* 70 Ohio St. 3d 377 (1994); and *Bojac Corp. v. Kutevac,* 64 Ohio App. 3d 368 (1990). Due to the fact that it is undisputed in this case that Petitioner's cause of action accrued in April, 1985, Petitioner's claim under ERISA § 510 filed more than seven (7) years later, in September, 1992, was, according to the District Court, untimely pursuant to the four-year statute of limitations set forth in Ohio Revised Code § 2305.09(D). The Sixth Circuit agreed that Petitioner's claim under ERISA § 510 was barred by the applicable four-year statute of limitations.

In his petition, Petitioner argues that Ohio's fifteen-year statute of limitations, found in Ohio Revised Code § 2305.06, for breach of a written agreement, should be applied to his claims in this case. In his petition, Petitioner erroneously analogizes his § 510 claim to different sections of ERISA which have different purposes and limitations periods. For example, Petitioner improperly

relies on *Dennis v. Sawbrook Steel Castings Co.*, 792 F. Supp. 552 (S.D. Ohio 1991), in support of his claim that a fifteen-year statute of limitations should be applied. However, *Dennis* involved a plaintiff's claim for breach of a written pension plan under ERISA § 502, 29 U.S.C. § 1132, while Petitioner has brought his claim in this case under ERISA § 510, 29 U.S.C. § 1140, for retaliation and interference with attainment of benefit rights, *not* for breach of a pension plan under § 502. In paragraphs 1 and 17 of his Complaint, Petitioner explicitly states that his claims are being brought pursuant to 29 U.S.C. § 1140 (ERISA § 510). Petitioner's only reference to a breach of contract in his Complaint appears in the following context in Paragraph No. 16 of his Complaint:

> 16. The action of Goodyear in *discharging* Plaintiff, refusing to recall and/or placing Plaintiff on its recall list after completing his incarceration was for the purpose of *interfering* with Plaintiff's attainment of benefits under an employee benefit plan and in *discrimination* of Plaintiff's future participation in the plan because of his mental illness. *Said actions* are also in violation and a breach of a *collective bargaining agreement* Goodyear is a party to. [Emphasis added]

Thus, in Paragraph No. 16 of his Complaint, it is clear that Petitioner is claiming that Goodyear interfered with his ability to obtain benefits, and that it violated the collective bargaining agreement, not that Goodyear violated the terms of any written benefit plan. Petitioner did not append to his Complaint the benefit plan, or the collective bargaining agreement, nor did he describe the

provisions therein which were allegedly violated. Obviously, Petitioner's interference and discharge claims are directly within the scope of ERISA § 510.

In his petition, Petitioner also relies on a decision by the Eighth Circuit in *Heideman v. PFL, Inc.*, 904 F.2d 1262 (8th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991), in which the Eighth Circuit applied a Missouri state contract statute of limitations to an ERISA § 510 claim. The Court in *Heideman*, however, did not distinguish the opposite approaches by the Ninth, Third, and Eleventh Circuit Courts in *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991); *Gavalik v. Continental Can Company*, 812 F.2d 834 (3rd Cir. 1987), *cert. denied*, 484 U.S. 979 (1987); and *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989), respectively, and *Heideman* was decided before *Felton* and *Hinton, supra*. The Eighth Circuit appears to be the only Circuit applying a state contract statute of limitations to an ERISA § 510 claim.

In his brief, Petitioner also relies upon *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210 (6th Cir. 1987), *cert. denied*, 484 U.S. 820 (1987), in support of his allegation that Ohio's fifteen-year statute of limitations for written contract claims should be applied to his claim. However, *Apponi* was not decided under ERISA, and the claim in *Apponi* did not, unlike the instant case, involve claims of retaliation or discharge from employment.

Finally, Petitioner argues in his petition that any statute of limitations applicable to his ERISA § 510 claim should have been tolled because of Petitioner's mental disability. However, Petitioner never raised this tolling

argument with either the District Court or the Sixth Circuit. Therefore, Petitioner is barred from raising this argument for this first time on appeal to this Court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); and *Walters v. First Tennessee Bank, N.A. Memphis*, 855 F.2d 267, 271 (6th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989). Further, it is absurd to argue that Petitioner's claims should have been tolled because of his alleged mental illness when Petitioner, by his own allegations, immediately began asserting his rights following his release from prison in 1985. (*See*, Appendix A, 10; and Appendix B) Despite his alleged mental incapacity, Petitioner apparently did have the wherewithal to file a lawsuit against Goodyear in district court in September, 1986, at which time his ERISA § 510 claim was still timely and could or should have been asserted, if at all. (*See*, Appendix B)

For the foregoing reasons, Appellee respectfully requests this Court to affirm the district court's finding that Petitioner's ERISA § 510 claims were barred by the applicable four year statute of limitations under Ohio law.

II. THE SIXTH CIRCUIT PROPERLY UPHELD SUMMARY JUDGMENT FOR RESPONDENT AS TO PETITIONER'S CLAIM FOR A BREACH OF THE COLLECTIVE BARGAINING AGREEMENT BASED ON THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL.

The Sixth Circuit properly upheld the District Court's grant of summary judgment to Respondent on Petitioner's breach of contract claims based on the doctrines of *res judicata* and collateral estoppel because the parties

previously submitted the identical facts and issues in this lawsuit to binding arbitration. An arbitration award in favor of Goodyear was delivered on April 14, 1986, and Petitioner sought review of the arbitration decision in the District Court. *See, Taylor v. The Goodyear Tire & Rubber Co.*, No. 91-3812, slip op. at 2 (6th Cir. March 23, 1992) (per curiam), which disposed of Petitioner's appeal of the arbitration decision. (Respondent's Appendix B). Petitioner's appeal of the arbitration was dismissed by the District Court, and, on March 23, 1992, the Sixth Circuit affirmed the District Court's dismissal. (*Id.*)

Upon reviewing the prior decisions of the District Court and the Sixth Circuit in prior litigation between the parties, the District Court in the instant case properly determined that:

> On the basis of Plaintiff's prior litigation, the Court must conclude that the Defendant's violation of the collective bargaining agreement has already been litigated – leading, no doubt, to collateral estoppel on that point. Regardless of this conclusion, however, it is clear that Plaintiff's prior arbitration and appeal addressed the very claims made here, barring this suit under the doctrine of *res judicata*.

(Petitioner's Appendix D, p. 42) The issue as to whether or not Respondent Goodyear breached the collective bargaining agreement applicable to Petitioner was the identical issue addressed by the arbitrator, and it was the identical subject of the prior litigation in the District Court, which was affirmed by the Sixth Circuit on March 23, 1992. Therefore, those prior decisions bar the instant suit not only under the doctrine of collateral estoppel, but

also clearly under the doctrine of *res judicata*. This Court has described the doctrines of *res judicata* and collateral estoppel as follows:

> Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.
>
> * * *
>
> Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties.

Kremer v. Chemical Construction Corp., 456 U.S. 461, 466-67 n.6 (1982) (citations omitted). *See, also, Benjamin v. Traffic Executive Association*, 869 F.2d 107, 113 (2d Cir. 1989); *Greenblat v. Drexel, Burnham, Lambert, Inc.*, 763 F.2d 1352, 1361 (11th Cir. 1985); *Sanders v. Washington Metropolitan Transit Authority*, 819 F.2d 1151, 1157-58 (D.C. Cir. 1987); and *Schattner v. Girard, Inc.*, 668 F.2d 1366, 1371 (D.C. Cir. 1981). Therefore, any claim Petitioner may have for breach of the collective bargaining agreement is clearly barred by the doctrine of *res judicata* because the identical factual and legal issues were addressed in Plaintiff's prior arbitration and lawsuit.

Petitioner's claim is also barred based on the doctrine of *res judicata* because, pursuant to Rule 18 of the Federal Rules of Civil Procedure, Petitioner could have, but did not, join his claim for violation of ERISA § 510 at the time he filed his lawsuit in September, 1986. *See, Kremer, supra*, 456 U.S. at 466-67.

Finally, to the extent that Petitioner claims that his employment termination violated the terms of the collective bargaining agreement with his union, such a claim is preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), and is barred by its six-month statute of limitations. *See, DelCostello, supra,* 462 U.S. at 170-171. In his brief, Petitioner relies on the pre-*DelCostello* decision of this Court in *International Union, UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966), which held that a § 301 claim should be governed by a state's contract statute of limitations. However, the Court's decision in *DelCostello* in 1983 obviously overturned all prior decisions in which varying state limitations periods were applied to § 301 claims. *Id.,* 462 U.S. at 170-171.

CONCLUSION

Petitioner has failed to show any basis for this Court to grant review. The decision of the Court of Appeals for the Sixth Circuit is consistent with applicable law, and judgment was properly entered in favor of Respondent by the courts below. Respondent therefore respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDDIE TAYLOR 1368 Frederick Boulevard Akron, Ohio 44320 Plaintiff	CASE NO. 5:92CV 1826 JUDGE DOWD
vs.	COMPLAINT
GOODYEAR TIRE AND RUBBER COMPANY 1144 E. Market Street Akron, Ohio 44306 Defendant	JURY DEMAND ENDORSED HEREON

JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1337. Plaintiff's claim arises under the Employment Retirement Income Security Act of 1974; 29 U.S.C. § 1001 *et seq.* and specifically 29 U.S.C. § 1140. This Court has exclusive jurisdiction of this action by the virtue of the provisions of 29 U.S.C. § 1132(e).

PARTIES

2. Plaintiff, Eddie Taylor, is a citizen of the State of Ohio and a resident of the City of Akron.

3. Defendant, Goodyear Tire and Rubber Company, is a corporation that does business in the state of Ohio with a place of business located at 1144 E. Market Street, Akron, Ohio 44306.

STATEMENT OF CLAIM

4. Plaintiff was employed by Defendant in various capacities including a tire builder from June 27, 1968 until January 23, 1980.

5. During the course of his lay-off, Plaintiff was incarcerated in the Ohio penal system and became afflicted with a mental illness.

6. Some time in May, 1983, Plaintiff informed John Nardella, President of United Rubber Workers No. 2, of his incarceration and asked him to pass this information on to Larry Wampler, a member of Defendant's management team.

7. Defendant was made aware that Plaintiff was incarcerated and was suffering from a mental illness.

8. Defendant sent Plaintiff a recall letter on September 30, 1983 requesting he return to work.

9. Plaintiff could not respond to Defendant's recall letter since he was incarcerated. As a result, Plaintiff was terminated by Defendant.

10. Plaintiff was released from prison in April, 1985 and requested that Defendant retroactively classify him as on a sick leave of absence during his incarceration. Defendant refused to comply with Plaintiff's request.

11. Defendant maintained health insurance and hospitalization coverage that would have paid for medical expenses arising out of Plaintiff's mental illness.

12. Defendant maintained a retirement and pension plan that Plaintiff was entitled to participate in.

13. Defendant's health insurance and retirement and pension plans constitute an "employee benefit plan" as defined in 29 U.S.C. § 1002.

14. Plaintiff was entitled to benefits under Defendant's employee benefit plans.

15. Plaintiff would have been entitled to greater retirement and pension benefits had he not been terminated by Defendant and/or recalled.

16. The action of Defendant in discharging Plaintiff, refusing to recall and/or placing Plaintiff on its recall list after completing his incarceration was for the purpose of interfering with Plaintiff's attainment of benefits under an employee benefit plan and in discrimination of Plaintiff's future participation in the plan because of his mental illness. Said actions are also in violation and a breach of a collective bargaining agreement Defendant is a party to.

17. Defendant's actions are in violation of 29 U.S.C. § 1140.

18. As a direct and proximate result of the conduct of the Defendant, Plaintiff has been deprived of his employment and all the rights and benefits to be derived therefrom.

WHEREFORE, Plaintiff prays that this Court:

(A) Award Plaintiff compensatory damages for the earnings and benefits lost by him from April, 1985 to the entry of judgment;

(B) Order the Defendant to reinstate the Plaintiff to his rightful position and retroactively restore to Plaintiff all of the benefits of his employment;

(C) Award Plaintiff costs and reasonable attorney fees; and

(D) Award any other relief that the Court may deem just and proper.

Respectfully submitted,

/s/ Robert J. Churilla

ROBERT J. CHURILLA, ESQ.
(0039907)
751 Broadway Avenue
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(216) 786-0400
Attorney for Plaintiff

JURY DEMAND

Plaintiff demands a trial by jury on all issues properly triable by a jury.

/s/ Robert J. Churilla

ROBERT J. CHURILLA, ESQ.
Attorney for the Plaintiff

APPENDIX B

NO. 91-3812

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE TAYLOR, Plaintiff-Appellant, v. GOODYEAR TIRE & RUBBER CO., et al., Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO NOT RECOMMENDED FOR FULL TEXT PUBLICATION

Decided and Filed March 23, 1992

BEFORE: **GUY** and **NELSON**, Circuit Judges, and **REAVLEY**, Senior Circuit Judge.*

PER CURIAM. This is an action to set aside a labor arbitration award. The district court dismissed the case as untimely. Shortly before the dismissal, the plaintiff informally requested the court to set aside a second arbitration award in which the procedural validity of the first award had been sustained. In dismissing the action the court instructed the plaintiff to let his lawyer file the appropriate papers to challenge the second award. Although ample time remained for such a challenge, the time expired without the appropriate papers having been

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* The Honorable Thomas M. Reavley, United States Court of Appeals for the Fifth Circuit, sitting by designation.

filed. The plaintiff then moved for relief under Rule 60(b), Fed. R. Civ. P. The motion was denied, and the plaintiff has appealed. Finding no abuse of discretion by the district court, we shall affirm the denial of Rule 60(b) relief.

I

The plaintiff, Eddie Taylor, was laid off from his job at Goodyear Tire & Rubber Co. in early 1980. He was recalled in 1983, but did not respond to the recall notice because he was incarcerated at the time. His employment was subsequently terminated by reason of his failure to report to work.

When he was released from prison in 1985, Mr. Taylor invoked the grievance procedure of the governing collective bargaining agreement to protest his termination. He argued that Goodyear should have considered him to be on leave of absence for illness, since he was being treated for mental illness while incarcerated.

The grievance went to arbitration, and an award in favor of the defendants was delivered on April 14, 1986. The action to vacate the award was not initiated until September 3, 1986. The defendants moved to dismiss the case under 9 U.S.C. § 12, which provides as follows: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."

At Mr. Taylor's request, the district court issued an order holding the motion to dismiss in abeyance pending resolution of further arbitration proceedings. It turned

out that the further proceedings involved a second grievance in which it was asserted that the arbitral award was invalid because, contrary to the terms of the collective bargaining agreement, it was not issued within 30 days of the hearing. A second arbitration was held in November to determine whether the decision rendered in the first arbitration was valid despite having been issued late. The merits of the first grievance were not reheard at the second arbitration.

The validity of the first award was upheld in an arbitral award issued on December 1, 1986. On December 15, Mr. Taylor filed a motion pro se asking the district court to set aside the second award. The December 15 motion was not served on the defendants or their attorneys. On December 24 the district court granted the defendants' pending motion to dismiss, finding that the complaint was not timely under 9 U.S.C. § 12. The complaint dealt only with the first arbitration award, of course, and the district court's entry of dismissal noted that "the complaint as presently filed is untimely because it seeks to vacate the award issued April 14, 1986;" the new award, as the court recognized, was simply not within the scope of the complaint. The court's entry further noted that Mr. Taylor planned to hire a lawyer; in light of this fact, Mr. Taylor was advised "that it would be in his own best interests to stop filing papers with the Court himself and allow his attorney to file the appropriate papers on his behalf."

After the district court dismissed the case, and following certain proceedings not directly relevant to the issues presented in this appeal, Mr. Taylor filed motions which the District Court construed as requests for relief

from judgment pursuant to Fed. R. Civ. P. 60(b). The motions were referred to a magistrate, who recommended that they be denied. The district court adopted the magistrate's recommendation and reiterated its conclusion that Mr. Taylor's complaint seeking to set aside the first award was time-barred. Mr. Taylor perfected a timely appeal from the denial of his Rule 60(b) motions.

II

Rule 60(b), Fed. R. Civ. P., permits a district court to relieve a party from a final judgment upon a showing of "(1) mistake, inadvertence, surprise, excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment." Appeal from a denial of relief under Rule 60(b) does not bring up the underlying judgment for review, and we review denial of a Rule 60(b) motion for abuse of discretion. *Amernational v. Action-Tungsram*, 925 F.2d 970, 975 (6th Cir. 1991).

Mr. Taylor concedes that his action to vacate the first arbitration award was barred by 9 U.S.C. § 12, but he contends that the district court erred in ignoring the December 15 motion to vacate the second award; the court, he suggests, ought sua sponte to have dealt with the December 15 motion as a motion for leave to amend the complaint. The court's failure to amend the complaint having been called to its attention in the Rule 60(b) motion, Mr. Taylor argues, it [sic] was an abuse of discretion for the Court not to reinstate the lawsuit.

We do not find the argument persuasive. Mr. Taylor had told the District Court that he planned to hire a

lawyer to handle his case for him, and the court's December 24 entry specifically instructed Mr. Taylor to allow his attorney to file the appropriate papers on his behalf. As of December 24, Mr. Taylor still had more than two months within which to make a proper challenge to the second arbitration award. Under these circumstances, we do not believe that the course taken by the district court represented an abuse of discretion. The judgment is therefore **AFFIRMED**.